Enforcement of competition in the energy sector of the European Union

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Three EU directives regulating the internal energy market of the European Union have created the conditions for opening up the market in the energy sector. However, the opening up and liberalization of the market was hindered by the positions and conduct of incumbent companies as well as by acts of intervention in the market by member states, distorting competition. In order to ensure that market liberalization is implemented in accordance with the directives, the European Commission has applied competition policy measures and sought to eliminate specific anti-competitive positions through proceedings and rulings. Prior EU procedures initiated for the enforcement of competition were dominated by cases directly affecting the competitive position of companies on the market, and concerned the conduct of those companies, their relative market powers and state aid. Exposing distortions to competition has in recent years been complemented by some new considerations – namely environmental and climate protection – that do not concern the competitive positions of companies. However, in EU procedures aimed at enforcing competition in the energy sector, adoption of these criteria must be harmonised with the requirement of strengthening the single internal market.[*]

Journal of Economic Literature (JEL) codes: D21, L12, L4.

The energy market of the European Union has been developed gradually – shaped by initiatives of the European Commission and decisions taken by the European Parliament – over nearly two decades. Three European Parliament and Council directives have been issued about the connection of isolated national electricity and natural gas markets since 1996 (European Commission, 1997, 1998, European Parliament, 2003, 2004, 2009*a*, 2009*b*). The general idea behind them was that the single European energy market has to ensure the economic growth and prosperity of the member states by providing a reliable supply of energy and competitive prices. The subsequent directives served to harmonize the national markets – replacing the existing regulations which varied by country – and create a

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[*] The research was funded by OTKA-project K 105435.

The Hungarian version of the article was published in *Külgazdaság,* 2015, Vol. LIX, No. 9–10, pp. 38–60 (*Vince Péter:* A versenypolitika érvényesítése az Európai Unió energiaszektorában).

Translated by *Gergely Markó.* Translation checked by *Chris Swart.*

single market of European Union member states. This would create the conditions required for cross-border competitions to develop between the players on the supply side. Furthermore, it is competition that can bring about the necessary changes all over the energy sector – on the supply and demand sides alike – it can help reduce prices, raise the quality of service, make energy use more efficient, strengthen the market position of users and in turn improve the competitiveness of member states.

Competition policy helps to achieve the overall objective of the liberalization of the energy market, as it promotes the three pillars of the energy policy of the European Union, namely sustainability, competitiveness and security of supply. The development of the regulations governing the market opening – i.e. the stages of energy market liberalization as set by the EU – in itself was inefficient in implementing the liberalization, and in achieving the set objectives. Although the formulation and implementation of general regulations for the energy market laid down the foundation for liberalization, the regulations were contravened by existing long-standing structures, such as the corporate status quo and the conduct of businesses distorting competition, the concentration of markets in production and wholesale trade, as well as the bottlenecks of the networks connecting member states, as well as the market distorting measures by member states.

The EU conducted an energy sector inquiry to assess the prevailing conditions and identify what hinder the development of a single European energy market (European Commission, 2007). The findings of the inquiry can be summarized as follows: "…that consumers and businesses are losing out because of inefficient and expensive gas and electricity markets" (EU Press, 2007). In the majority of EU member states the gas and electricity markets continue to function as national markets, limiting competition. The negative conclusion of the inquiry was further confirmed when a series of issues were identified (European Commission, 2008, 2009*a*). The most important ones were the following: structural problems, including the concentration of national markets (at both wholesale and retail levels), the dominant position of vertically integrated companies, which either have a dominant position or are monopolies, and – as a result of this – the fact that system and network operators are not independently owned. Another cause of the malfunctioning of energy markets was the market distorting intervention by national authorities.

As a result of the inquiry the Third Directive was implemented laying down the general rules for the operation of the energy markets and the energy sector, as well as the steps of the next stage of market opening, the interconnection of national markets (European

Parliament, 2009*a*, 2009*b*). To facilitate the liberalization of energy markets the European Commission decided not only about the further development of market regulation, but about using competition policy measures as well. “To tackle these problems, the Commission will pursue follow-up action in individual cases under the competition rules (antitrust, cartels, merger control and state aids) and act to improve the regulatory framework for energy liberalisation” (EU Press, 2007).

Using competition policy instruments – unlike the type of sectoral market regulation in the three implemented liberalisation energy packages – can, after identifying the market distorting factors, in individual cases ex post modify the existing conditions that stand in the way of liberalisation and which have to do with the conduct by certain companies and the prevailing structure of the market. The reason the competition policy, i.e. antitrust, merger control or state aid regulation was applied is that there were practices by companies that contravened competition policy, and prevailing individual market situations (both vertical and horizontal concentration on the generation and wholesale trade market), which could not be remedied by the so called second package of measures, the comprehensive regulation of energy markets adopted in 2003–2004. The procedures applying competition policy[1] therefore complemented energy sector regulation. Competition policy therefore grants the European Commission additional powers to address issues outside sectoral market regulation (European Commission, 2011, European Commission, 2013*a*).

Based on this the European Commission initiated many procedures in the energy sectors of EU member states in the first decade of the 21st century to reduce or end the dominance and/or market distorting conduct of incumbent, vertically integrated companies. These procedures brought about some ownerships unbundling, the divesting some activities and the regulation of the conduct of companies in order to increase the intensity of competition. These procedures did not only limit the dominance of the companies against whom procedure was initiated, but changed the whole structure of the energy markets involved as well, by making it possible for new actors to enter the market, which promoted liberalization of the energy markets, offering a wider range of choices to users.

[1] For more information about the procedures visit: http://ec.europa.eu/competition/index_en.html, http://ec.europa.eu/competition/sectors/energy/cases_en.html, http://ec.europa.eu/competition/elojade/isef/index.cfm

Competition policy had to be implemented because of the market distorting situations, which had more to do with the conduct of member states than that of companies. These included the transposition delay of community legislation by member states, the violations by national authorities with regard to price regulation and the incompatible provision of state aid (EU Press, 2009*a*, 2010).

For an overview of the obstacles to energy market competition and how the European Union addressed such issues in the period starting with the implementation of the second package lasting until 2010 see *Vince* [2011]. The current paper examines the more recent developments: the period starting in 2010 with some cases of distorting competition, abuse of dominant position, merger, and state aid incompatible with the internal market, EU procedures to further competition policy, which examined whether the competition distorting corporate positions and structural problems were present. These cases give an insight into what the European Commission takes into consideration in the course of competition procedures, and how it implements them in practice.

The main purpose of this paper is to present some of decisions adopted by the European Commission (and rulings of the Court of Justice of the European Union) that have changed the conditions of competition to show what considerations were taken into account prior to decision making. An insight will be given in the economic considerations in exposing the market distorting activities of companies in the energy sector of Europe, and then the considerations of the EU procedures aimed at ending such situations. The majority of cases, issues presented in this paper are dated after 2010, i.e. they come from a period when as the result of the inquiry such procedures were initiated more frequently because of the market distorting activities of companies. Court of Justice of the European Union and European Commission documents as well as analyses of the cases were the primary sources of this paper.

The types of cases

The types of cases of EU procedures enforcing competition policy concerning specific member states or companies were quite varied. The cases below do not cover the whole range, as each case had its own unique characteristics, but these examples can give us an insight into the main features of the procedures, and the considerations taken into account by the Commission.

One key group of cases concerned can be described as abusive or competition distorting conduct by companies. Corporate conduct restricting competition, and the abuse of dominance can manifest itself in various forms, the initiated EU procedures concern cases such as cartels, abuse of dominant position, e.g. market foreclosure, price based restriction to competition, discrimination of markets and partners, as well as exclusivity agreements. European Commission decisions distinguish several types of corporate conduct restricting competition, and the decisions proposed various measures in the different procedures. There are four different types of procedures: antitrust procedures, cartel cases, mergers and state aid-related cases.[2]

The precursors were the procedures initiated as a result of the 2006 annual report giving an overview of the opening of the EU gas and electricity market. Of these the most notable ones are the inquiries initiated and conducted exploring the practices of companies on the energy market distorting competition (European Commission, 2007, 2008). In these cases the Commission wished to "make full use of its powers under antitrust rules (Articles 81, 82 and 86 of the EC Treaty), merger control rules (Regulation 139/2004) and state aid control (Articles 87 and 88 of the EC Treaty" (EU Press, 2007).[3] Between 2006 and 2009 the European Commission procedures involved such companies as E.ON, Ruhrgas, GDF, EDF, ENI, RWE and Distrigas. In every case the procedures brought about restrictions to the dominance of the companies, modification of their conduct, changing the overall structure of the companies and energy markets involved, making it possible for new players to enter the market, which would lead to the development of more favourable conditions that are beneficial to consumers (*Vince*, 2011).

The settlement of disputes

Before presenting the different types of cases, we will outline the dispute settlement process. Disputes between companies and member states on the one hand and the European Commission on the other are resolved in two stages. The first step is the procedure conducted by the Commission, which is followed by the court proceedings, in the course of which the outcome of the procedure is reviewed.

The procedures initiated by the European Commission for company activities that distort the market or limit competition tend not to be continued at the Court of Justice of the European Union. The reason is that these procedures end with an agreement between the

[2] The number of different types of settled cases between 2010 and July 2015 is as follows: 10 antitrust, 1 cartel, 127 merger, and 174 state aid.

The procedures can be found at : http://ec.europa.eu/competition/sectors/energy/cases_en.html

[3] As of 2008 procedures were conducted according to article 102 of TFEU (TFEU, 2008).

Commission and the companies, without a decision, as this was advantageous to both parties. The companies themselves took the initiative to modify their activities and conduct in a way that the Commission would find fit to remedy the restrictive practices exposed by the Commission. It is beneficial for companies to come to an agreement after consultation with the Commission so that no infringement is recorded and that by their *legally binding commitment* they do not have to face the unforeseeable but possibly dire consequences of a decision stating that the company is involved in activities that restrict competition.

The European Committee also benefits from arriving at a legally binding commitment at the end of the procedure. If these cases are not taken to court, these competition restricting situations can be resolved more promptly; if the procedure were to be carried on, there would be the looming possibility of the court decision changing the Commission resolution. (Later in the paper two examples are presented of such a scenario.) This is why the majority of procedures initiated by the European Commission concerning companies ended with an agreement, while the dispute was not taken to court.

The majority of energy sector cases taken to the Court of Justice of the European Union[4] were not related to companies but *infringement procedures* against member states, i.e. they settled disputes between member states and the European Commission. Until 2014 the cases were about not meeting the deadline for the transposition, introduction of the third energy package and other regulations, therefore the Commission took the dispute to the Court of Justice of the European Union. The initiation of procedures sped up the transposition of EU regulations into national legislation, so these cases never reached the ruling phase.

The Court of Justice of the European Union upheld the decision of the European Commission for all merger cases, and has not reversed any of them since 2004. This is probably because disputes of this kind were much more rarely taken to court by the companies than Commission decisions about state aid incompatible with the internal

[4] About the activities of the General Court (GC) and The European Court of Justice (ECJ) related to the energy sector see: http://curia.europa.eu/jcms/jcms/Jo2_7033/presentation, and http://europa.eu/about-eu/institutions-bodies/court-justice/ For details of individual cases see: http://curia.europa.eu/juris/liste.jsf?pro=&nat=&oqp=&dates=&lg=&language=hu&jur=C%2CT&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&td=ALL&pcs=O&avg=&page=1&mat=ENER%252Cor&etat=clot&jge=&for=&cid=717465

market. The companies and the European Commission could come to an agreement about the conditions for the modification of mergers, which was initiated by the Commission (*Mosso*, 2014).

Antitrust procedures

Of the cases presented two antitrust procedures will be presented, both of which were concluded in 2010, ending the series of cases of the second half of the first decade of the 21st century involving the largest European energy companies. After these cases the next ones are dated after 2010.

There were several procedures concerning *Electricitè de France* (EDF) in the second half of the first decade, of which this one ended in 2010. According to the statement issued by the European Commission [2010*c*] EDF having dominant position on the French market abused its dominant position by including exclusivity and restrictions on resale in its long-term supply contracts with large industrial customers, as this limited the opportunities of consumers to purchase and sell electricity (excluded consumers from the market), and hindered the entry of alternative suppliers onto the market. This constitutes an anti-competitive market foreclosure[5] as defined by EU regulations.

In the commitment procedure the decision stated that EDF used *restrictive practices*. The EDF undertook to modify its contracts with its partners to open the wholesale energy market to competition: 65% of the volumes contracted on the relevant market will be made available every year for re-contracting by alternative suppliers, i.e. making it possible for new suppliers to enter the market. Moreover, it committed itself to reducing the number of exclusive contracts with large consumers as well, which will boost competition in this market.

The other *antitrust procedure* was the one initiated against *Svenska Kraftnät,* the Swedish electricity system operator for *abuse of dominance*. The Swedish electricity system operator is state owned and is responsible for the operation of the transmission system among other things. According to the European Commission Svenska Kraftnät abused its dominant position by controlling the international electricity exchange: it limited the amount of export transmission capacity available on electricity interconnectors situated along its

[5] "The term 'anti-competitive foreclosure' is used to describe a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers" (European Commission, 2009*b*).

border. By this it discriminated between domestic and export markets, giving preference to domestic consumers, which means the company did not treat the users at different geographic locations as a single market. The system operator argued that it limited export capacities with the objective of relieving occasional congestion on the domestic network (EU Press, 2009*c*).

To promote greater integration of the energy market of the European Union the Commission expected the Swedish system operator *to open up the market* in such a way that would relieve network congestion through means other than limiting export capacities (EU Press, 2009*c*). Svenska Kraftnät committed itself to subdividing the Swedish transmission system into several bidding zones. The configuration of the bidding zones would be flexible enough to adapt quickly to load fluctuations. This way any congestion could be managed not by limiting the export but different pricing for different zones (European Commission, 2010*a*).

An antitrust procedure[6] was also initiated concerning the Romanian power exchange in 2012 (European Commission, 2014*c*). The investigation was conducted for *abuse of dominance* and *abusive conduct restricting competition* concerning OPCOM (and its parent company Transelectrica) the company operating the power exchange of Romania. OPCOM committed an infringement by *discriminating* against companies on the wholesale electricity spot market based on their nationality/place of establishment. It only let foreign traders enter the day-ahead and intraday markets if they had a Romanian VAT registration number in addition to the VAT registration in their home countries, another EU member states. The registration meant additional cost which were not required by either the regulations of the EU or the national laws of Romania but were imposed by OPCOM on EU companies that were otherwise not compelled to pay taxes in Romania. The reason for this was that OPCOM wanted to have cover – using the payments made by these companies – to be able to provide advances and finance transactions conducted by OPCOM between domestic companies and companies from other member states for the VAT payable until it is refunded.

[6] The energy sector of new member states became a new area of EU antitrust procedures. This can be due to the fact that joining the European Union and adopting energy packages that initiated the opening up of the market brought requirements that were radically different from the structural-organizational and management system of the energy sector of these countries as well as from the traditions of corporate behaviour.

According to the European Commission decision OPCOM's conduct must be regarded as an abuse of dominant position, i.e. discrimination against traders established in an EU member state other than Romania has a competition restricting effect. What also made it difficult for EU traders to enter the market was that there was no other source of supply available because of the 100 percent market weight of OPCOM. Since the infringement lasted for nearly five years the amount of the fine was EUR 1 million, and the company had to terminate its discriminative behaviour.

Again it was a new member state that was involved in the next antitrust procedure for *market foreclosure*. In its procedure initiated in 2011, the European Commission investigated whether the Czech company ČEZ abused its dominant position on the market for generation and wholesale supply of electricity (European Commission 2013*b*). The state-owned vertically integrated incumbent company held a dominant position on the Czech market of electricity generation (owning 60 percent of capacities in 2011), distribution and trading.

What led to foreclosure was when the company reserved capacities in the electricity transmission network to purchase the electricity generated in its lignite- and natural gas-fired plants. By this it effectively prevented potential competitors from entering the market, because there were no capacities left for them in the transmission system. Already at the very beginning of the inquiry the Commission started from the assumption that ČEZ would not have been able to use all the reserved capacities, but it managed to prevent the entry of potential competitors into the market.

The European Commission concluded that the conduct of ČEZ constituted infringement, but accepted the company's *commitment* to sell its 800–1000 MW plant capacity, this way decreasing its market dominance. The Commission concluded that by selling off these capacities to competitors, the competition infringing conduct of the company can be remedied.

Another investigation initiated in 2010 concerning a *competition restricting agreement* involved two companies. The joint venture Areva NP for the design and construction of nuclear power plants was set up by Siemens AG and Areva SA in 2001 and Siemens sold its shares to its business partner in 2009 (European Commission, 2012*b*). There was an agreement about non-compete obligation between the two companies, which continued for a period of 8 to 11 years after Siemens's exit from the joint venture. (Its duration was reduced by the award of an arbitral tribunal to 4 years.) The scope of non-compete obligation covered not only Siemens products competing with those of Areva NP, but also products outside the joint venture, i.e. its non-competing nuclear power plant activities.

The Commission's investigation was based on the assumption that after the termination of the joint venture the non-compete obligation – because of its duration and wide product scope – is in violation of EU competition regulation. With regard to the duration of non-use of confidential business information the Commission argued it should not be longer than three years, and the restriction of competition can only apply to markets Areva NP had been active in with its own products, and it could not be applied to Siemens's own products that do not compete with the former joint venture.

The Commission investigated whether a less restrictive non-compete obligation measure could achieve the same result protecting Areva NP against Siemens. The European Commission found that confidential business information as well as confidential technological know-how can be protected by less restrictive measures, and at the same time they would not make it completely impossible for Siemens to enter the market on its own. Such measure is the so called confidentiality clause that came into force when the joint venture was set up, and keeping it in force after its termination also ensures that Siemens cannot use the information it gathered at the time of the joint venture, but still allow Siemens to enter the market at a later date. For this reason the European Commission found the maintenance of the non-compete clause to be anti-competitive.

Based on the above the two companies made a *legally binding commitment* for the annulment of the non-compete clause and to allow Siemens to enter the market where it can be a competitor of Areva NP. Siemens also accepted that certain restrictions would be applicable for a transition period of three years.

There was only one *cartel case* investigated by the Commission in the reviewed period. In the case of two power exchanges, the French EPEX Spot and the Finnish–Norwegian–Swedish Nord Pool Spot the Commission found that the power exchanges made a general agreement not to compete (European Commission, 2014*a*). The Commission carried out random inspections – at the premises of both exchanges – collecting information about the anti-competition activities of the two companies and their anti-competitive agreement. The non-competition arrangement covered and extended beyond the European Economic Area and covered spot electricity trading services. The objective of the arrangement was not to compete with each other, protect their traditional strongholds and to agree on expansion to new countries, while maintaining the power balance between them. The market sharing agreement covered many areas, for example the geographical division of activities, that they do not compete with each other on the domestic market of the other party, not to participate in tenders where the other party takes part, and not to compete in acquisitions. The fine for the anti-competition agreement which lasted at least seven and a half months was EUR 5.98 billion.

The last of the reviewed *antitrust procedures* was opened against the Russian company Gazprom in 2012, which was still not completed at the time of writing, in the autumn of 2015. The procedure was started because the European Commission had concerns that *Gazprom may be abusing its dominant position* in upstream gas supply markets in Central and Eastern Europe, which constituted a restriction of competition, and led to higher natural gas prices than in other European regions (European Commission, 2012*c*). Gazprom's market dominance is demonstrated by the fact that in the natural gas markets of the countries involved the company had a greater than 50 percent market share, and in some cases it was the exclusive supplier. The dependence of these eight member states is the reason why the issue of infringement has to be addressed. The statement of objections alleges that Gazprom has infringed EU antitrust regulations by partitioning the gas markets of the region (European Commission, 2015*a*). By this it goes against the regulations governing the structure and operation of the gas market of the EU, which stipulate that in domestic and cross-border trade markets have to operate transparently and according to uniform rules without discrimination. The possible infringement covers the following three areas. The first is called territorial restrictions, which means that the buyers cannot sell the natural gas in other countries. The territorial restrictions were of several kinds: the ban on exports, the designation of end-user, and that buyers had to obtain Gazprom's approval for any deviation from the clauses. Each of these restrictions prevents the free trade of natural gas, the cross-border flow of gas, and therefore the possibility of obtaining gas from other sources at more competitive prices.

As for the Commission's preliminary conclusion outlined in the Statement of Objections, the other possible infringement is that Gazprom has charged unfair prices in five Central and Eastern European countries *(*Bulgaria, Estonia, Latvia, Lithuania and Poland*).* The Commission is investigating whether the use of oil indexation by Gazprom – a calculation method favourable to the company – has contributed to higher prices.

The Commission has concerns that the third way Gazprom leveraged its market dominance in Bulgaria and Poland was by making gas supplies conditional upon obtaining certain infrastructure-related commitments from wholesalers. The contracts included such provisions as Gazprom's participation in controlling the operation of the Bulgarian network, and that the Polish buyer undertook making related network investments.

In the next step of the procedure that started in 2012, in the phase following the statement of objections, there will be consultations between the Commission and Gazprom, and the company will get the chance to defend its position before a decision is made.

Merger transactions

The European Commission approved of the purchase of shares of two Dutch companies and the acquisition of two German companies by Gazrpom. These companies engage in natural gas and crude oil exploration, gas transportation and storage. The transaction affected the German, Austrian and Czech natural gas markets (European Commission, 2013*c*). The Commission found that Gazprom did not become dominant as a result of the transactions in either natural gas transfer or storage, and the transaction did not restrict customers' access to gas supplies, given the presence of alternative upstream suppliers.

It is not the peculiarities surrounding the acquisition[7] that make this case interesting, but the fact that the Commission further developed the practice of defining a *relevant geographical market* in the acquisition approval process in one market segment involved in this case (*Mosso*, 2014, European Commission, 2013*d*, para 35, 36, 37). In previous procedures the Commission took into consideration what effect natural gas transfer and storage transactions would have on competition on national or regional markets.[8] However, the implementation of the third energy package, which made the connection between national networks a priority, created a new situation as this sped up the changes already taking place in the geographic dimensions of markets, i.e. it expanded the geographic scope of merger transactions.

The European Commission assessed the effects of competition of the transaction between Gazprom and Wingas in relation to a considerably larger geographical area than previously. In addition, it argued that as a result of wider liberalization, the border of the geographic

[7] The Commission passed this resolution on the expansion of Gazprom separately from the antitrust procedure concerning the Central and Easter European markets.

[8] The European Commission made a decision based exclusively on the prevalent competitive situation on the internal, national market concerning the Hungarian natural gas market, involving E.ON and MOL (European Commission, 2005).

market should be drawn independently from the border of the country, and these borders should be adjusted to changing market conditions and regulations.

Another procedure was initiated because of an *acquisition* transaction between two of the largest multinational manufacturers of power systems, General Electric (GE) and Alstom after GE submitted a bid for the energy businesses of Alstom (European Commission, 2015*b*). In the procedure the European Commission made some observations to the effect that the transaction in its original form would have negative effects on competition. The Commission observed that in the heavy duty gas turbines for power plants market segment the transaction – the acquisition of a competitor – would reduce the scope for competition. Earlier the three biggest suppliers of such power plant components (GE, Siemens and Alstom) had competed on the European market, and two of them were involved in the transaction, which would limit the customers' choice to two in the future. This would lead to the risk of having higher prices and the need for innovation would be reduced, and the choice of customers (power plants) would be more limited. The acquisition of a competitor would have another dire consequence, one that has nothing to do with competition: it would have an effect on the market of environmentally-friendly technology – currently part of the Alstom product range – which helps slow down climate change. However, the European Commission did not find the transaction infringing on other market segments, as the companies were not each other's competitors there.

In order to address the Commission's concerns GE offered to make a legally binding commitment not to buy the gas turbine business. It proposed Ansaldo of Italy as a potential purchaser for these assets. This company had had a very small market share until then. By divesting the gas turbine business, with the entry of the new company taking the place of Alstom, the sources of supply for such equipment would not become more limited, and the scope for competition would not be reduced. The Commission accepted the commitment and will approve the acquisition after the divestment has been realized.

State aid cases

State aid[9] can occur in relation to regulated tariffs, taxation, and sometimes power purchase agreements, but investigations into state support provided to certain investments, including energy efficiency ones, emissions trading, and renewable energy sources are also aimed at finding out whether the procedures used by national authorities constituted infringement. (It

[9] Documents about state aid cases can be found at http://ec.europa.eu/competition/state_aid/register/

was a very common case type; the European Commission has dealt with 174 cases since 2010.) In the following two legal disputes the European Commission had the final word.

Did MOL Nyrt. receive incompatible state aid? How did the Court of Justice of the European Union settle the dispute between the European Commission and the Hungarian Oil & Gas Plc (MOL Nyrt.)? The case concerning MOL Nyrt was taken to the Court of Justice of the European Union, as the parties could not settle the dispute out of court. It is worth presenting the case briefly as the Court of Justice of the European Union reversed the decision of the Commission.

The Commission found that MOL Nyrt. received incompatible state aid, and took a decision on its repayment. The Commission did not accept the company's objections and counterarguments during the procedure. The outcome desired by the company was not achieved through consultation, so the case was taken to the Court of Justice of the European Union by MOL.

In 2010 the European Commission took the decision that the state of Hungary provided incompatible state aid to MOL Nyrt. between 2008 and 2009 (European Commission 2010b).[10] The investigation opened in 2009 on the basis that the mining fee payable by MOL Nyrt. for the extraction of hydrocarbons was to remain the same until 2020 (based on an agreement made with the government in 2005), while an amendment to the Mining Act that entered into force in 2008 raised the mining fee considerably (EU Press, 2009*b*). However, with its 2005 agreement MOL Nyrt. was exempted from paying part of the mining fee, the increment, while others, who had not entered into a contract with the government, had to pay the increased fee. The European Commission stated that "...the aid under assessment thus constituted incompatible state aid." (European Commission, 2010*b*, point 106) and provided that the total difference for the years 2008 and 2009 (HUF 30,3 billion) was to be recovered by Hungary from MOL plus recovery interest. According to the Commission's decision the company was selectively exempted from paying the mining fee, which gave the company an advantage over its competitors; however this constitutes

[10] This was not the first procedure initiated by the European Commission in the case of Hungary which granted incompatible state aid, and not even the biggest. The long-term electricity purchase agreements between MVM and power plants or even the funding of MALÉV involved much larger amounts of state aid, and the European Commission frequently finds the same incompatible state aid activities in connection with other countries and companies. The competition authority of the European Union pays special attention to such cases as they can have very severe competition distorting effects on the market.

state aid, which is incompatible with the common market. Pursuant to the Treaty on the Functioning of the European Union (TFEU, 2012) the Commission based its decision on one of the four conditions of state aid, the condition of selectivity, i.e. that the state selectively favoured the company.[11]

MOL Nyrt. turned to the Court of Justice of the European Union requesting the annulment of the decision of the European Commission (*Vince*, 2013). In 2015 the judgement of first instance was upheld at second instance by the Court of Justice of the European Union, upholding MOL Nyrt's complaint, ordering the recovery of the amounts and the complete annulment of the Commission decision (European Court, 2013, 2015, *Bruxinfo.hu*, 2015). According to the judgement the Commission could not support its claim that the company was selectively favoured[12], and had benefits that its competitors did not have access to. The

[11] The four conditions for state aid are as follows: "…for a national measure to be classified as State aid for the purposes of Article 107(1)TFEU, it must fulfil four cumulative conditions: there must be an intervention by the State or through State resources; it must be liable to affect trade between Member States; it advantage on the recipient and, finally, it must distort or threaten to distort competition" (European Court, 2015, p. 2).

[12] The argument behind the Court decision rejecting the claim that MOL received state aid selectively is as follows (European Court, 2015, p. 2). "The Court of Justice finds that the General Court was right to hold that the mere fact that the Hungarian authorities enjoy limited discretion, defined by law, to determine the rate of the extension fee is not sufficient to establish that certain undertakings might gain a selective advantage there from. That latitude allows the fixing of an additional charge imposed on economic operators in order to take account of the imperatives arising from the principle of equal treatment, and can therefore be distinguished from cases in which the exercise of such discretion is connected with the grant of an advantage in favour of a specific economic operator.

Likewise, the General Court did not err in law in finding that the fact that the rates set by the 2005 agreement were the result of negotiation between MOL and the Hungarian authorities did not suffice to confer on that agreement a selective character, on the grounds that those authorities exercised their discretion to set the rate of the mining fee objectively and without discrimination and did not, therefore, favour MOL over its competitors.

Furthermore, the Court states that the General Court could validly conclude that the discretion enjoyed by the Hungarian authorities with regard to the choice of whether or not to conclude an extension agreement did not enable MOL to gain any selective advantage. The criteria laid down by the Mining Act for the conclusion of an extension agreement are objective and applicable to any potentially interested operator fulfilling those criteria, so that the conclusion of the 2005 agreement on the basis of that act did not favour MOL over its competitors.

In addition, the Court of Justice observes that, bearing in mind the fact that State interventions take various forms and have to be assessed in relation to their effects, it is not inconceivable that several consecutive judgement of Court of Justice of the European Union states that the state measure in question granted a general advantage, not only for one specific company, although other market players did not seize that opportunity (European Court, 2015).

The next legal dispute concerning the state aid to the French company *Électricité de France* (EDF) had a similar outcome. In 2003 the European Commission made a decision that the company received incompatible state aid, which was also annulled by the Court of Justice of the European Union. The basis of the dispute was whether the Republic of France gave incompatible aid in the form of a tax break to EDF, a company that is in almost complete state ownership (Invest in EU, 2015).

The legal dispute revolved around the interpretation of the injection of state capital. The Commission argued that EDF received tax cuts between 1986 and 1997 for network investment by the state renaming some of the obligations of the company the state's own capital contribution, without taxing it. The Commission argued that the capital injection could not be justified by any low yield and must therefore be considered state aid. And with this state aid EDF had an advantage over its competitors. In the European Commission's calculation the unpaid tax (including interests) amounted to EUR 1.3 billion, which the company would have to pay back to the state.

The Court of Justice of the European Union reversed the finding at second instance (European Court, 2012). It argued that the Commission declared the conversion of the obligations of EDF to be a state investment producing poor yield – after which the company got its tax cuts – without examining whether a private investor would have been willing to invest in it under similar conditions and with similar profit prospects. This way it could not be proven that the aid was incompatible and it was not feasible economically, so the state of France had to pay back the amount to the company.

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measures of State intervention should have, for the purposes of Article 107(1) TFEU, to be regarded as a single intervention, in particular when those measures, having regard to their chronology, their purpose and the circumstances of the undertaking at the time of the interventions, are so closely related to each other that they are inseparable from one another.

In that regard, the Court of Justice, like the General Court, finds that there are no such links between the 2005 agreement and the amendment of the Mining Act. The increase in the level of the mining fees, resulting from the amendment of the Mining Act, occurred in a context of an increase in international crude oil prices. The Commission did not argue that the 2005 agreement had been concluded in anticipation of such an increase. Those two elements therefore do not constitute a single aid measure and thus do not constitute State aid."

An assessment of the effects of competition policy enforcement

There is no information available about how effective and practical the antitrust, merger and state aid related procedures presented above are and how much they can remedy the distortion of competition. However, there is a review of the literature about the evaluation of competition policy enforcement *(Ilzkovitz–Dierx*, 2015)[13] that looks at the effects of procedures initiated in merger, antitrust and cartel cases. *Ilzkovitz–Dierx* [2015] presents various macro- and microeconomic impacts; of the latter this paper highlights those that sum up the general characteristics of specific analysed cases. According to the literature analysing the impact of procedures initiated because of mergers or abuse of dominant position, structural decisions, i.e. decisions that change the corporate and/or market structure are more effective in eliminating competition distorting positions than the regulations aimed at changing corporate behaviour.

> *Resolutions concerning competition restricting conduct* may call for the modifications of the anti-competitive contracts of the company or even their termination. In addition the Commission may initiate actions that increase the supply or promote investments that solve bottleneck situations. *Resolutions about reorganisation* have more dire consequences for companies, as in order to decrease the vertical or horizontal concentration they may require the modification of the business and/or ownership structure. Resolutions may call for the divestiture of whole divisions, the partition of activities, or the selling off of some parts of the company or certain activities (*Hancher–de Hauteclocque*, 2010).

Another conclusion made in the review is that in addition to the competition authority decisions – which are unfavourable from the companies' points of view – in individual cases strong control may prevent mergers that have a competition distorting effect. According to estimates the cost of merger control may be exceeded by the incremental costs not realized – which also affects users – because of the enforcement of competition policy, which would otherwise be the consequence of the competition distorting situations following the realization of transactions.

[13] The paper reviews the literature on the experience of competition authorities and independent research studies.

The next finding of the review of literature is that the EU regulation of *mergers* which has been in force since 2004 (Council of The European Union, 2004) has significantly decreased the likelihood of wrong EU decisions being made, for example permitting competition restricting transactions, and also decreased the likelihood of preventing transactions that are favourable for competition.

With regard to *antitrust cases*, in terms of the abuse of dominant position the conclusion may be drawn that it is not regulation but the procedures initiated in specific cases that play an important role in eliminating competition distorting situations. It is not the amount of fines or the cost of procedures payable by the companies that are significant, but the negative impact that a decision may have on the goodwill of the company.

EU competition procedures proved to be least effective in *cartel cases*. There are methodological reasons for this, as these agreements are invisible, intangible by nature, which means that estimating the impact of cartels is quite difficult. According to estimates 80 percent of such dealings remain hidden. According to another calculation the cost increase caused by cartels is very significant: it is estimated that there can be on average as much as 15–20 percent overpricing in these cases. (Although in the northern and western regions of the European Union things may not be overpriced quite as much.) It is also difficult to estimate the profit realized by companies involved in cartel activities. Proposed solutions are the refinement of regulations and the development of the methodology on the one hand and increasing fines on the other.

New emphases in shaping the competitive conditions in the energy sector

The energy sector contributes substantially to the competitiveness of the European Union. It helps the EU achieve such long-term objectives as environmental impact management, reducing CO_2 emissions, sustainable development and slowing down climate change. In addition such considerations had to be taken into account that are also important in the short term, like reducing our dependency on energy imports, connecting gas and electricity networks at an international level, maintaining security of supply and encouraging investment, and mitigating the increase of EU energy prices – which were growing faster than global energy prices – in the early 2010s. One of the most important means of achieving these diverse objectives in the energy sector was the creation of a single market (connecting isolated national markets).

The Commission implemented competition policy measures to achieve these objectives. This way the individual procedures could be grouped not only by case type, but also by the role they played in defusing tensions (European Commission, 2014*b*).

Procedures for the provision of state aid were initiated in cases that differed significantly from one another, and the Commission had to consider their competition distorting effects carefully, and, at the same time take into account how the objectives not related to competition but to environmental protection and the use of renewable energy sources could be achieved as well. There are examples of state aid practices that the Commission prohibited, while others were permitted. Regulated energy prices could give some consumers an undue price advantage (using less expensive sources of energy), could hinder the opening up of the market as well as facilitate environmental considerations (by using renewable energy sources, reducing CO_2 emissions). State aid could be given if justified even for specific investment purposes like those that were aimed at eliminating bottlenecks in some parts of the natural gas infrastructure – typically in new member states – or that improved energy efficiency.

The following could be observed when approving *mergers*: it proved to be important when considering transactions whether the new entrants entering the market by acquisition would eliminate bottlenecks, which is necessary to increase competition, make the supply more secure, and to create better access to new energy sources (including renewable ones). In *antitrust procedures* the security of supply was an important consideration. (This figured highly in the Gazprom case presented earlier, which was closely linked to the security of supply of the economy of those countries as they had no other sources of energy available to them.)

The array of considerations for adopting and implementing competition policy measures became wider, and in antitrust, merger and state aid cases the considerations taken into account in the procedures became more complex. The harmonization of the different types of requirements is important especially in the case of state aid.[14] Environmental and climate protection considerations, requirements of sustainable growth as well as the conditions for the security of supply had to be harmonized with the requirements of strengthening the internal market, increasing energy market competition, and that the former objectives can

[14] The European Commission drew up the guidelines for energy and the environment for the period 2014–2020 (European Commission, 2014*b*).

be achieved without distorting the operation of the internal market. It is without doubt a new development that these different types of considerations that have to be taken into account simultaneously appear more and more frequently in the procedures checking the enforcement of competition policy.

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